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INTRODUCTION

The problem of control and regulation of ocean resources was one of the most difficult problems Japan faced on her return to international society after the Second World War. This problem graphically illustrated the Japanese position in international society. For Japan was not only in the position of an advanced fishing nation; she was also faced with a general tendency which worked against her prewar fishing operation. Japan had to protect her fisheries while a postwar "progressive" movement in the international law of the seas with restraint as its means and conservation as its goal, tended to create a new balance in the international fishery.

This modification of the concept of ocean fisheries right operates as a fetter on the Japanese fishermen who have been excluded from certain world ocean fisheries year after year. Thus, it is quite natural for Japanese fishermen to favor maintenance of the traditional doctrine of freedom of access to the ocean fisheries and free competition in fishing operations. However, neither the author nor the Japanese Government is necessarily in favor of such a passionate and unrealistic view.

In 1952 Japan concluded the International Convention for the High Seas Fisheries of the North Pacific Ocean[1] [hereinafter cited as Tripartite Treaty] with the United States and Canada, thereby subjecting her fishing activities in the North Pacific Ocean to regulation. The treaty embodied the principle of abstention whereby Japan was excluded from fishing on the high seas for certain stocks of fish.[2] Al-

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[1] May 9, 1952, [1953] 4 U.S.T. 380, T.I.A.S. No. 2786.

[2] In § 1 of the annex of the convention, Japan agreed to abstain from fishing:
(1) Halibut
off the coasts of Canada and the United States... in which commercial fishing for halibut is being or can be prosecuted. Halibut referred to herein shall be those originating along the coasts of North America;
(2) Herring
off the coasts of Canada and United States.... exclusive of the Bering Sea and of the waters of the North Pacific Ocean west of the meridian passing through the extremity of the Alaskan Peninsula, in which commercial fishing for herring of North American origin is being or can be prosecuted;
(3) Salmon
off the coasts of Canada and the United States.... exclusive of the Bering Sea and of the waters of the North Pacific Ocean west of a provisional line following the meridian passing through the western extremity of Atka Island; in which com-

though Japan signed the Tripartite Treaty, she has never fully accepted the abstention principle as a legitimate doctrine of international law. As a developed fishing nation engaged in extensive high seas exploitation, Japan necessarily opposes any principle which restricts her high seas fishing operations. Traditionally, Japan has subscribed to the doctrine of free exploitation of ocean resources, but today she recognizes the need for certain controls in the interest of conservation. The abstention principle, however, does not embody the types of controls to which Japan would ascribe.

The Tripartite Treaty may be terminated at any time; provisions in the convention provide for unilateral termination by any of the parties after ten years from the effective date of the treaty.[3] In view of present efforts to renegotiate the treaty and the possibility of termination, it is very important to determine the present legal status of the abstention principle which the United States may continue to support and which Japan will most certainly continue to oppose.

It should be our task to objectively determine whether the abstention principle embodied in the Tripartite Treaty rationalizes the conservation of ocean resources in view of the historic development or transmutation of the concept of fishery rights under the international law of the seas. In order to do so, we must examine both the abstention principle and the historical development of fishery rights. Ultimately, this necessitates discussion of the consistency or lack thereof between

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mercial fishing for salmon originating in the rivers of Canada and the United States of America is being or can be prosecuted.

In § II of the annex, Japan and Canada agreed to abstain from fishing salmon in The Convention area of the Bering Sea east of the line starting from the Cape Prince of Wales on the west coast of Alaska, running westward to 168°58'22.59" West Longitude; thence due south to a point 65°15'00" North Latitude; thence along the great circle course which passes through 51° North Latitude and 167° East Longitude; thence south along a provisional line which follows this meridian to the territorial waters limit of Atka Island; in which commercial fishing for salmon originating in the rivers of the United States of America is being or can be prosecuted.

In the protocol to the convention, it was made very clear that the provisional area of abstention and conservation of salmon demarcated by the line of merdian long. 175°W. and the line following the meridian passing through the western extremity of Atka Island was only provisional and subject to readjustment. No change has been made as yet.

Because of lack of a sufficient showing that halibut stocks were being fully utilized, one of the necessary conditions for application of the abstention principle, in 1962 Japan was given the right to fish halibut in portions of the East Bering Sea theretofore closed to them.

[3] Article XI(2) states that the convention:

shall continue in force for a period of ten years and thereafter until one year from the day on which a Contracting Party shall give notice to the other Contracting Parties of an intention of terminating the Convention, whereupon it shall terminate as to all Contracting Parties.

the Tripartite Treaty and the Convention on Fishing and Conservation of the Living Resources of the High Seas.[4] The validity of the abstention principle must be judged in two respects: (1) its legal status in the Tripartite Treaty itself; and (2) its legal status judged in the light of general principles of international law, past and present.

I. The Abstention Principle and the Tripartite Treaty

In the *Anglo-Norwegian Fisheries Case*[5] of December 18, 1951, the International Court of Justice ruled that at least the implied consent of other nations was necessary before Norway could assert her "historic title" to the disputed areas of water.[6] The concept of historic title in the *Anglo-Norwegian Fisheries Case* does not differ significantly from the concepts of "past record" and "contiguity" embodied in the abstention principle as articulated by the United States. It is therefore reasonable to assume that the validity of the abstention principle depends upon the extent to which other nations have acquiesced in that principle. Japan's consent to the abstention principle might be assumed because she entered into an agreement adopting that principle, but her signing of the Tripartite Treaty does not automatically signify acquiescence and thus legitimize the principle of abstention.

In the first place, Japan was obligated to enter into a treaty by article 9 of the Peace Treaty signed by Japan in San Francisco on September 8, 1951.[7] Japan's status and independence as a sovereign

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[4] Adopted by the United Nations Conference of the Law of the Sea, U.N. Doc. A/Conf. 13/L.54 (1958).

[5] Judgment of December 18, 1951, [1951] I.C.J. 116-206.

[6] The litigation was between Norway and Great Britain. Norway, by the Royal Decree of July 12, 1935, delimited a fisheries zone for that part of Norway situated north of lat. 66°28.8'N. The case concerned the validity under international law of the lines of delimitation of the zone and the validity of the base lines of the marginal sea drawn in such delimitation. The International Court of Justice ruled that the Royal Decree did not constitute a violation of international law and that the lines of delimitation, using the straight lines method of delimitation, were valid. While one judge asserted that Norway had proved the existence of historic title to the disputed areas of water, the majority disagreed. The Court ruled that at least the implied consent of other nations was necessary before Norway could assert historic title. However, the Court presumed that Norway had exercised an exclusive right on the premise that the rule of international law itself was uncertain and changing. Moreover, England had to bear the burden of proving the nonexistence of consent. Thus, the decision in the *Anglo-Norwegian Fisheries Case* may be regarded as proclaiming that access to a fishery based on the freedom of the high seas is a traditional non-exclusive right and different in nature from "historic title."

[7] Article 9 provides that:

> Japan will enter promptly into negotiations with the Allied Powers so desiring for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.

25 Dep't. State Bull. No. 635, 350 (1951).

nation at the time she entered into the Tripartite Treaty is at least questionable. Although assurances were given by the United States that Japan was a free and independent agent in the negotiations, the fact is that at the time of the negotiations the United States had not ratified the Peace Treaty with Japan,[8] and allied forces still occupied Japanese territory. Japan certainly was not coerced into signing the Tripartite Treaty, but there were undoubtedly subtle pressures on Japan to accept without great objection the suggestion of the victor. In any event it is clear that the question of coercion cannot settle the matter of consent one way or the other.

Instead of quibbling over the issue of whether or not Japan was a free agent when she entered into the Tripartite Treaty, it would be more useful to inquire into the understanding of the parties as to the meaning of the agreement itself. In other words, did Japan agree to the abstention principle as the United States presently articulates that principle? It is possible that Japan signed the agreement without fully understanding the meaning of abstention as used by the United States. Such misunderstanding would not negate the legal effect of the treaty, but the misunderstanding would certainly bear on the question of consent which would give legitimacy to the concept of abstention in later negotiations for a new treaty between the United States and Japan.

In 1951 during the negotiation of the Tripartite Treaty a basic difference in the United States and Japanese approaches to the fisheries problem arose. The American draft of the treaty advocated that Japan abstain from certain fishing operations in order to conserve ocean resources that had been subject to conservation programs of Canada and the United States in previous years.[9] In contrast, the Japanese draft advocated as a principle of the treaty free access to the ocean resources and free competition; Japan recognized the necessity of regulation for the purpose of conserving ocean resources, but did not recognize the principle of exclusion of one nation and not others.[10]

[8] Negotiations for the Tripartite Treaty extended from November 4 to December 14, 1951; President Truman signed the Peace Treaty on April 15, 1952.

[9] Abstention from fishing operations in order to conserve ocean resources under certain conditions was regarded as the basic principle according to the American draft. However, a departure from the general application of this principle was included as an important "exception" as to specific nations with "past records."

[10] Japan's premise was that freedom of access to ocean fisheries is the basic doctrine and that a conservation program is admitted as an exception only to the extent necessary. Moreover, Japan believed that regulatory measures for conservation should only establish rates or quotas of harvest and not prohibit fishing operations entirely. *See* MINISTRY OF FOREIGN AFFAIRS, TRIPARTITE FISHERIES CONFERENCE (Nov.-Dec., 1951).

The differences of opinions between Japan and the United States (and Canada)[11] caused various conflicts during the negotiation process. It is possible that so much confusion arose during these negotiations that there was no "meeting of the minds" on certain central matters in the final agreement.

The original American draft provided exceptions to the application of the principle of abstention as to (a) the fisheries contiguous to the territorial sea of a state because of the fundamental interests of that state with respect to her coastal area, and (b) the fisheries which each state has, recently or at present, exploited and maintained on a substantial scale based on her economic and historic interests. The reasons for this proviso can be explained in the following way:[12]

> Regulatory arrangements for a particular fishery can best be made by the state whose continued use of, or relative proximity to, the affected resources gives them both the interest and the intimate knowledge necessary for wise and effective control. Control by those who best know and understand the particular fishery is not only most likely to be well suited to the needs of the fishery, but also to be governed by the practical common-sense idea that no regulations should be adopted unless adequate reason for them can be shown.

Thus it would appear, at least when literally interpreted, that the original American draft proposed exceptions to the application of the abstention principle on two different grounds: one based on supremacy of the coastal state and the other on "respect" for past records. In the process of negotiation, however, the United States agreed to give up the notion of supremacy of the coastal state in view of Japan's strong opposition. But, in my view, the United States did not in fact give up the notion of supremacy of the coastal state because the supremacy notion and the past record concept are interrelated.[13] It would be safe to conclude that, in spite of the alleged concession to the Japa-

[11] Canada's interests in the North Pacific are similar to those of the United States. Not only did she support incorporation of the abstention principle into the Tripartite Treaty, but she also joined the United States in urging inclusion of the principle in the Convention on Fishing and Conservation of the Living Resources of the High Seas.

[12] Bishop, *International Law Commission Draft on Fisheries,* 50 AM. J. INT'L L. 629 (1956). While Bishop was referring to the background within which the 1955 draft articles of the International Law Commission should be examined, this American viewpoint would appear to be equally applicable within the context of the Tripartite Treaty negotiations.

[13] These two ideas were not alternative means to accomplish the exclusion of Japanese fishery but were seemingly proposed to achieve the goal in a strengthened fashion. Either idea, embracing the other within it, could have reached the expected result.

nese request, the supremacy of the coastal state idea has been maintained in a restrictive form within the concept of "past record." Such a conclusion can be supported by examining the concept of contiguous as used in the original United States draft and as revealed in the negotiation proceedings.

According to the American delegation the concept of contiguous within the meaning of "any stock of fish which exists within the high seas *contiguous* to the territorial sea," (the provision deleted by the United States) (emphasis added) is entirely different from the usual concept of contiguous used to describe the relationship between a "neighboring sea" and a coastal line. Under the American view, all areas are "contiguous" regardless of their distance from the coast so long as stocks of fish are constantly discoverable from the coastline to the "contiguous" areas. For example, even if a certain stock of fish is discovered in the high seas far from the coastal line it would be a contiguous stock if it is discoverable between the coastal area and the high seas location.

Given the American definition of contiguous it is clear that the concept of contiguous is wholly different from the idea of supremacy of the coastal state based on its geographical proximity to the sea. However, the definition seems to embody a kind of natural law idea that the coastal state has a superior claim to ocean resources because of its proximity to those resources.

Having arrived at this definition of contiguous, the American delegation argued that the state contiguous to certain stocks of fish need not abstain from fishing for those stocks; that is, the contiguous concept should be considered independently of the three conditions[14] required for the application of the abstention principle under the Tripartite Treaty. Its concept of contiguous, in other words, would allow

[14] According to article IV(1)(b), before application of the abstention principle to any stock of fish it must be shown that:

(i) Evidence based upon scientific research indicates that more intensive exploitation of the stock will not provide a substantial increase in yield which can be sustained year after year;

(ii) The exploitation of the stock is limited or otherwise regulated through legal measures by each Party which is substantially engaged in its exploitation, for the purpose of maintaining or increasing its maximum sustained productivity; such limitations and regulations being in accordance with conservation programs based upon scientific research, and;

(iii) The stock is the subject of extensive scientific study designed to discover whether the stock is being fully utilized and the conditions necessary for maintaining its maximum sustained productivity.

It is noteworthy that scientific research is required in each condition.

the United States to fish for salmon which are "contiguous" to her coast, and, at the same time, require other nations to abstain.[15]

The same result can be achieved by using the concept of past record.[16] It is reasonable to assume that when a certain stock of fish contiguous and past record are identical, particularly when applied to exploitation by that state. In a functional sense, then, the concepts of continguous and past record are identical, particularly when applied to certain fisheries in the North Pacific.

Because the concept of contiguous is absorbed within the concept of past record, the United States, in fact, did not accede to the request of Japan to abandon the notion of supremacy of the coastal state. The alleged "compromise" did not occur.[17] Did Japan appreciate this fact or should she have appreciated it? If one answers this question affirmatively, then he must conclude that Japan consented to the principle of abstention embodied in the Tripartite Treaty of 1952. If, however, Japan did not appreciate or could not have been expected to appreciate the situation in view of the alleged compromise on the part of the United States, then it cannot be said that Japan agreed to the abstention principle. The question of consent in view of the historical circumstances and the confusion generated in the actual negotiation is at least debatable. The *Anglo-Norwegian Fisheries Case* of 1951 would

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[15] The motivation for such an argument by the United States delegation may be inferred from the following considerations: (1) Unless a stock of fish meets the three conditions of article IV (1)(b), there would be no reason to assert the supremacy of coastal states based on the "contiguous" concept because the general application of the principle of abstention cannot be attained in such a case; (2) On the other hand, when the three conditions are met with respect to certain stocks of fish (*e.g.*, in case of full utilization or in case of existence of conservation regulations by any of the concerned states), the coastal state would be excepted, based on the concept of "contiguous," from the general application of the duty to abstain.

[16] The proviso to article IV states *inter alia:*

> [N]o recommendation shall be made for abstention by a Contracting Party concerned with regard to: (1) any stock of fish which at any time during the twenty-five years next preceding the entry into force of this Convention has been under substantial exploitation by that Party having regard to the conditions referred to in Section 2 of this Article;....

[17] As a result of the "compromise," the United States is in a strong position to stabilize its present position. The "compromise" allows a coastal state long utilizing conservation measures to apply those regulations to another nation as to those species of fish found in the high seas "contiguous" to its territorial sea. More concretely stated, the United States may claim the application of its conservation to Japanese fishermen if the United States had theretofore imposed those regulations on her fishermen in regard to the fishing operations in the high seas. Indeed, the United States may exclude or prohibit other nations from certain high seas fisheries if her own fishermen were so prohibited (but note that United States fishermen could be allowed to operate within her territorial sea). Needless to say, the imposition of such regulations by the United States would be subject to the consent of foreign nations, but we cannot deny the strategically superior position possessed by the United States at the beginning of the negotiation process.

seem to indicate that the burden of proving the nonexistence of consent rests with Japan. Japan would have a difficult time sustaining the burden of proof in view of the fact that she entered into a treaty which clearly embodies the principle of abstention and the concept of past record, but the question of Japan's consent is certainly not clearcut; the doubts surrounding the formulation of the abstention principle certainly weaken the precedential value of the Tripartite Treaty as establishing the validity of the abstention principle as a legitimate doctrine of international law. It is now necessary to examine the abstention principle in light of present and past precedential matter.

II. AN EVALUATION OF LEGAL PRECEDENT FOR THE ACCEPTABILITY OF THE ABSTENTION PRINCIPLE AS A VALID DOCTRINE OF INTERNATIONAL LAW

The roots of the United States' argument for abstention can be traced to earlier fishery controversies. The concept of the "territorial sea" was a product of factors unrelated to fisheries interests. But once the concept had come into existence, the exclusive character of fisheries right was explained as an attribute of the sovereignty to territorial seas. Thus, an expansion beyond territorial seas of a monopolized fisheries area necessarily required an expansion of territorial seas themselves, and a nation in so doing had to prove the existence of a "historic title"[18] to justify such an expansion.

After the middle of the nineteenth century, however, such an international legal order of seas was challenged and endeavors were made to explain exclusive fisheries right from a basis other than a territorial theory. The first in this trend of events was the Bering Sea Fur Seal Arbitration of 1893[19] [hereinafter cited as Fur Seal Case], contested between the United States and Great Britain, where we can observe a germ of the "abstention" idea in the United States position.

In the Fur Seal Case,[20] the United States asserted exclusive jurisdic-

[18] According to traditional theory, "historic title" is regarded as an exception to the general rules of international law. Historic title is the legitimization of an originally illegal act by the continuation of its practice for a long period of time.

[19] *See* P. COBBETT, LEADING CASES ON INTERNATIONAL LAW, 128-29 (4th ed. 1922); 2 H. SMITH, GREAT BRITAIN AND THE LAW OF NATIONS 103 (1935).

[20] Between 1868 and 1871, the United States promulgated a series of domestic regulatory statutes prohibiting capture of fur seals without license in the area adjacent to Alaska. The license was conditioned as to time, quantity, and use of weapons. From the beginning, the Departments of State and Treasury took the view that the United States could enforce such regulations only within 3 miles with respect to foreign fisheries. They asserted that foreign fisheries operated outside the 3-mile territorial limit were free from domestic regulations. *See* L. LEONARD, INTERNATIONAL REGULATION OF FISHERIES 57 (1944). But after 1886, the United States

tion over foreign sealing boats operating beyond the 3-mile territorial limit on the basis of her alleged proprietary interest in the fur seals and alleged right to protect the fur seal industry claimed to have been purchased from Russia.[21]

The main issues presented in the controversy were: (a) whether the United States could exercise her exclusive jurisdiction over foreign boats outside the 3-mile limit because of her alleged proprietary interest in fur seals, and (b) whether the United States could seize Canadian boats in the high seas because of the latter's "unethical" method of catching fur seals. The United States did not assert territorial expansion or expansion of territorial jurisdiction; nor did she claim to revive the idea of proprietary interest over the oceans, *(mare clausum)*, which was antithetical to the then current principle of free access to the high seas. Rather, as noted previously, the United States asserted an exclusive fisheries right allegedly superior to the then-existing legal order of the high seas because of its conservation motive and proprietary interest in fur seals. In the arbitration contest the United States stated that, although fur seals were animals *ferae naturae*, they belonged to the United States. The reasons were stated as follows: (a) fur seals make annual returns to the Pribilof Islands; (b) hence, a proprietary interest lodges in the nation who can control and exploit (without depletion) such animals and (c) which has in past endeavors undertaken such exploitation and conservation.

Britain argued that property in animals *ferae naturae* was dependent upon actual possession; she maintained that once the seals had de-

started to seize British boats about 60 miles from the coastal line claiming violations of domestic regulations, and United States courts cooperated by enforcing such measures. *See* F. GREFFCKEN, LA QUESTION D'ALASKA, REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE t. 23, 238-40 (1891). In negotiations between the two nations from 1887 to 1891, the United States gave up after strong British protest a de facto "closed sea" argument regarding the Bering Sea as well as the assertion of a territorial sea limit of 100 miles, but tried to justify the regulations by asserting proprietary interests in and a right to protect fur seals. At the same time, the State Department urged that the seven concerned nations conclude an international treaty to regulate capture of fur seals in the Bering Sea, proposed establishment of restrictive measures relating to prohibition of firing weapons, time of harvest, and annual quotas, and emphasized, because of the recurring migratory nature of fur seals, the impracticability of creation of an off-limits area covering the fifty miles from the coast. Negotiations were broken off, however, because of Canadian opposition. Continuous Canadian fishing operations in the area stiffened the United States attitude. The controversy in the Fur Seal Case arose from a United States seizure of a British (Canadian) boat outside the 3-mile territorial limit.

[21] The United States justified her assertion of exclusive jurisdiction by maintaining that it was an emergency rule to conserve natural resources in which a huge amount of money was invested; that the conservation claim was superior to normal rules of the sea; and that the current migratory nature of fur seals established ownership in the United States. *See* P. COBBETT, LEADING CASES ON INTERNATIONAL LAW 128-29 (4th ed. 1922).

parted from the islands into the high seas, they were no longer under the proprietorship of the United States, and that the principle of free fishing on the high seas was applicable. Britain responded to the United States contention that conservation requirements dictated the exclusion of foreign boats from broad areas of the high seas by alleging that such exclusion violated the freedom of the high seas and that the United States claim of necessity could not be recognized as an international right unless express or implied consent had been given by the nations concerned.

The tribunal adopted the British viewpoint. It was decided that the United States had no proprietary interest nor a right to protect fur seals in the Bering Sea so long as they were outside the 3-mile limit. The exclusive exercise of fisheries right was limited to the territorial sea with respect to the fur seals as well as to other ocean resources. In rendering this opinion, however, the tribunal proposed certain conservation measures intended to bind both nations.[22] The tribunal advised that both nations refrain from capturing fur seals within the 60-mile area surrounding the Pribilof Islands, and that they determine a certain period when capturing be allowed in the high seas outside the prohibited area. The tribunal also recommended that the fishing operations be subject to licensing and that fishing equipment be subject to restrictions. Both nations followed this advice by legislating certain domestic regulatory rules.[23] Thus, the advice of the tribunal recognized the fisheries right of the noncoastal nation (*i.e.*, Britain) to operate outside the 60-mile limit off the Alaskan coast. And the tribunal, in heeding the conservation requirements, equally allocated the fisheries between the two nations. The tribunal at no time suggested that one nation should abstain from fishing for the resource while the other nation continue its historic exploitation. The Fur Seal Case is certainly not authority for the principle of abstention.

Thus, the United States successfully obtained protection of fur seals by the exclusion of noncoastal state operations on certain portions of the high seas, but the excludable portion did not extend to the maximum possible excursion point of fur seals (being limited to a 60-mile zone around the Pribilof Islands). Moreover, the United States was not allowed to exploit furs in the excluded area. The concepts of contiguous and past record were not present in the settlement of the

[22] The proposals were authorized by the Arbitration Agreement concluded on February 29, 1892, between Britain and the United States.

[23] *See* P. JESSUP, L'EXPLOITATION DES RICHESSES DE LA MER, RECUEIL DE COURS t. 29, 419-20 (1929).

fur seal dispute. Conservation was accomplished without creating special rights in the coastal state.

In 1911 the Convention for the Preservation and Protection of Fur Seals[24] [hereinafter cited as Fur Seal Treaty] modified the traditional method of equal restriction of fisheries rights in the high seas by entirely prohibiting the capture of fur seals on the high seas and by imposing a duty upon a nation which had breeding lands to deliver certain portions of the harvest to other nations. Thus the treaty sought to balance the economic interests of fursealing between coastal and noncoastal nations.

It is clear that neither the Fur Seal Case nor the subsequent Fur Seal Treaty recognized the principle of abstention as advocated by the United States in the 1952 Tripartite Treaty. In 1937 and 1938 there were renewed efforts in the United States to exclude foreign nations from fishing on the high seas where there were stocks of fish important to the United States coastal fishermen. These efforts were primarily directed at Japanese salmon fishing operations in the Alaska area. The Copeland Bill[25] purported to expand United States territorial jurisdiction. Another bill[26] claimed a proprietary interest in salmon and asserted jurisdiction of the area where salmon traveled. But these two proposals were regarded as legally defective and were defeated. Some people suggested that Japan be allowed to participate in fishing activities only if she undertook certain conservation measures, but this proposal was harshly criticized. For example, Senator Schwellenbach said, "[t]his proposal would accomplish nothing but granting Japanese participation to the fisheries which the United States and Canada had protected and built up. A treaty should be bilateral. A treaty which simply admits a third nation to participate to an order maintained by the United States and Canada should not be approved."[27] Before any legal action was taken however, a *modus vivendi* was concluded between the United States and Japan on March 25, 1938; Japan agreed to cease issuing fishery licenses to boats exploiting the Bristol Bay salmon without risking damage to her international right.[28] Nothing in the negotiations at this time between

[24] 104 BRIT. FOR. STATE PAPERS 175 (1911); *See* 37 Stat. 1542, T.S. No. 564. The parties to the treaty were Russia, Japan, the United States, and Great Britain.
[25] S. 3744, 75th Cong., 3d Sess. (1938).
[26] S. 2679, 75th Cong., 3d Sess. (1938).
[27] Comment broadcasted in January, 1938.
[28] *See* S. RIESENFELD, PROTECTION OF COASTAL FISHERIES UNDER INTERNATIONAL LAW 247-49 (1942); L. LEONARD, INTERNATIONAL REGULATION OF FISHERIES 57 (1944).

Japan and the United States would lend support to an assertion of the abstention principle as a recognized principle of international law.

The 1945 Proclamation[29] by President Truman did not declare a right to generally exclude third nations from fisheries in described conservation areas. The basic underlying theory of the declaration, however, shared a common basis with the principle of abstention: that is, "proximity" of a coastal nation to ocean resources and "exploitation and conservation" of natural resources on large scale by a coastal nation or by other nations were regarded as important. It was explained that these two basic elements could justify creation of certain conservation areas wherein a nation could enforce regulatory measures regarding all fishing activities. It was also asserted that proximity and conservation would even justify exclusion of newcomers in the fishing areas. Therefore, contrary to the prevailing understanding in Japan as to the meaning of the proviso in the declaration (*i.e.*, a proviso which states that the nature of "high seas" in the conservation area should be conserved), the proviso should be understood as merely guaranteeing that the declaration is not a declaration of territorial jurisdiction while rejecting the traditional principle of free access and free competition with respect to ocean resources.[30] The declaration should be regarded as combining the idea of "conservation regulations" of ocean resources on the high seas by a nation with "past record," thus excluding fishing operations by noncoastal nations who have no past record.

The Truman Proclamation, therefore, incorporates the principle of "past record" which functionally would serve to exclude Japan on certain fishing activities in which she had at that time not engaged. The unilateral expression of President Truman would have no force in international law unless accepted by the nations concerned. In a note of February 7, 1951, to Ambassador Dulles, Prime Minister Yoshida of Japan accepted the United States viewpoint expressed in the Truman Declaration as a temporary measure before the conclusion of a new fisheries treaty. The Yoshida note stated in part:[31]

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[29] 59 Stat. 885-86, 10 Fed. Reg. 12304 (1945).

[30] The Proclamation states:

> The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected.

[31] 24 DEP'T. STATE BULL. No. 608, 351 (1951). (Emphasis added.)

> In the meantime, the Japanese Government will, as a voluntary act, *implying no waiver of their international rights,* prohibit their resident nationals and vessels from carrying on fishing operations in presently conserved fisheries in all waters where arrangements have already been made, either by international or domestic act, to protect the fisheries from overharvesting, and in which fisheries Japanese nationals or vessels were not in the year 1940 conducting operations.

Although the root of the abstention principle as a policy of the United States can be traced back to the fur seal dispute between Britain and the United States, no assertion of principles which support the abstention argument seemed to have a basis in international law with the possible exception of the Truman Proclamation which was at least qualifiedly accepted by Japan through the Yoshida note. The Yoshida note, though expressly not waiving Japan's rights under international law, and the subsequent apparent acceptance of the abstention principle in the Tripartite Treaty provide the only concrete precedents for the claim that Japan accepted the abstention principle as a valid doctrine of international law. It would appear that Japan had unconsciously cooperated in accumulating for the United States precedents favorable to the latter's position on abstention without recognizing the real issues regarding the ocean resources of the North Pacific.

In final analysis the merits of the abstention principle must be judged in light of the new legal order embodied in the Convention on Fishing and Conservation of the Living Resources of the High Seas[32] [hereinafter cited as High Seas Convention]. This convention is the product of compromise between the classical doctrine of freedom of the high seas and the necessity to conserve ocean resources. It is a leading example of the future legal order. No nation can disregard its existence in formulating principles which will guide it in future negotiations with other nations concerning the regulation and control of ocean resources. The most critical point to examine at this time is whether the abstention principle advocated by the United States as a general principle at the Conference on the Law of the Sea conforms with the legal order established by the High Seas Convention; is the abstention principle merely a quantitative expansion for certain special conditions of principles embodied in the High Seas Convention?

The United States ratified the High Seas Convention on April 12,

[32] Adopted by the United Nations Conference on the Law of the Sea, U.N. Doc. A/C.13/L.54 (1958).

1961, but with the caveat that ratification of the treaty should not be construed as a bar to the application of the principle of abstention. According to the United States, failure to include the principle of abstention as a general rule in the Geneva Conference on the Law of the Sea was due merely to the lack of understanding of the depletion problem by most delegations. Therefore, the United States, it would seem, considers the abstention principle as not contrary to the High Seas Convention, but, rather, implicit in the legal order created under that treaty. It would seem that the United States understands the concept of supremacy of a coastal state or of a state with a "past record" in the High Seas Convention[33] to embody the notions of "past record" and "contiguous," in the Tripartite Treaty; hence, the former is considered equivalent to the exception to the application of the abstention principle in the Tripartite Treaty. If the concept of "past record" in both of these treaties is identical, then the United States is justified in concluding that the High Seas Convention supports the abstention principle. Our inquiry must be focused, therefore, on the meaning of "past record" in the High Seas Convention.[34]

From the legal point of view, the United States understanding con-

[33] The "past record" concept, such as it is, is dealt with in arts. 3, 4, and 5.

[34] Another reason that the United States and Canada introduced a proposal to insert the abstention principle into the treaty at the Geneva Conference on the Law of the Sea was to fill a gap in the draft of the International Law Commission (1956). It was asserted that a mere guarantee of the supremacy of conservation measures would not be enough for the conservation of particular stocks of fish. (Explanatory material for U.S.-Canada joint proposal distributed at the Geneva Conference on April 11, 1958. Full text is reported in 38 DEP'T. OF STATE BULL. No. 983, 708 (1958).) Still another point which should not be disregarded is the interpretation of article 2 of the High Seas Convention:

> [T]he expression "conservation..." means the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products....

The United States asserted that, since conservation is defined in terms of total maximum yield, a conservation program designed to secure a larger supply of food for a particular state by decreasing total yield would not satisfy the duty imposed by article 1(2):

> All States have the duty to adopt, or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

In order to prohibit expressly such a conservation program, the United States asserted that the abstention principle should be inserted in the Convention. *See* Dean. *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L L. 625 (1958).

Given the United States view that fishing operations by newcomers would inevitably lead to the decrease in total production of stocks of fish which have arrived at maximum sustainable yield, the above assertion seems natural. Whether art. 1 para. 2 of the convention refers to a conservation measure designed to maintain present production without restricting participation to or the application of the abstention principle with respect to certain particular species of fish, seems to be the turning point of the controversy.

tains inherent deficiencies. Unlike the apparent United States view, the High Seas Convention does not conceive the concepts of past record and contiguous as overlapping; rather the convention assumes that the two concepts are distinct but competing and need to be compromised.[35] The convention, assuming conflicting interests between pelagic fishing nations and coastal states, purports to take a compromise position between the concepts of "past record" and "contiguous." Moreover, the concept of past record in the High Seas Convention does not allow for the possibility of an exclusive fishery right by the coastal state. Without such exclusivity the convention cannot be said as a matter of course to recognize the principle of abstention for the conservation of certain specific stocks of fish.

Of course, the High Seas Convention does present a new conservation scheme which departs from the classical principle of free access to the ocean fisheries. The fishery regulations of the convention are not based on the entirely free consent of the nations concerned but are conditioned on a binding scientifically objective standard. From the viewpoint of the High Seas Convention, a third nation, as a general rule, cannot be excluded from fishing operations,[36] although there may be occasions where third nations are required to show reasonable "respect" toward pre-existing conservation regulations of coastal states.[37] The concept of "respect for" in the High Seas Convention is much different from the concept of "exclusion from" in the abstention principle advocated by the United States.

The High Seas Convention does not embody the principle of abstention. In fact, the convention suggests that the notion of past record which leads to exclusivity is not an acceptable concept in international law. The proper concept of past record as embodied in the convention

[35] The convention purports to take a compromise position with provisions based on "past record" in arts. 3, 4, and 5, and provisions relating to the interests of coastal nations in arts. 6 and 7.

[36] The High Seas Convention deals with the concept of "past record" resulting from execution of *nonexclusive* rights of fishery. The so-called "historic title" concept was not dealt with. Therefore, the instances where "abstention" can be applied to nations with no "past record" would be rare; *e.g.*, where all the nations concerned are equally obliged to abstain when the necessity of conservation is scientifically proved, or the case where the quota for each nation becomes practically zero as a consequence of scientific application of the data collected for the purpose of conservation. It should be noted that these illustrations are theoretically different from an unconditional general denial of access to fisheries by a third nation. There may be, of course, an exceptional case where a third nation may not engage in fishing operations because the coastal nation has already engaged in a conservation program within her territorial sea. Operation in the adjacent high seas would also be prohibited.

[37] *See* art. 1(1)(b) and generally art. 6.

directs that the past record of a coastal state be shown respect by noncoastal fishermen. Past record, however, does not automatically exclude noncoastal fishermen without past records from fishing stocks on the high seas. It is therefore reasonable to conclude that the abstention principle has not been accepted as a general doctrine of international law.

III. CONCLUSION

In the traditional theory of international law of the seas, historic title was used to justify exclusive use of areas of the high seas when such use would have been otherwise prohibited. Coastal nations attempted to expand their territorial seas and hence their monopolized area of fisheries relying on historic titles. On the other hand, noncoastal nations engaged in fisheries as a matter of nonexclusive right regardless of their historic titles (*i.e.*, "past records").

As we have seen, under the abstention principle, whether or not nonexclusive rights to participate in high sea fisheries will be recognized for those noncoastal nations is likely to depend upon the will of coastal nations which have engaged in a conservation program. When we carefully examined the historical development of ocean fisheries right, we saw that such a principle has not been generalized as yet, for the High Seas Convention did not allow an exclusion of operations by noncoastal nations or no-past-record nations. Thus, the problem faced by the three nations of the Tripartite Treaty is to propose a revision of that treaty which would draw a rational line between it and the High Seas Convention and to settle objectively the relationship of the abstention principle to the evolving international law of the seas.

In regulating and deciding the legal status of fishing boats on the high seas and resolving resulting conflicts, the concept of "territorial jurisdiction" is still very important. But this concept can neither regulate operational aspects of fisheries as an industry or as an enterprise, nor formulate a scheme of allocation of sea resources among nations. When we realize the importance of ocean resources as a source of food supply to the world, we should idealistically also regard ocean fisheries as an international common enterprise functioning under an international nonterritorial jurisdiction. The denial of an expansion for national appropriation should be the minimum requirement for an exploitation and allocation of ocean resources. Although maximum sustained yield can be an excellent standard to decide total

fishing ceilings or fishing frequency, it can never decide a proper method of allocation nor can it be used as a basis for excluding third nations from fisheries. However earnestly conservation or the necessity of protecting ocean resources may be advocated, it would be nothing but an assertion for appropriation of certain stocks of fish to certain nations so long as "past record" of a conservation program by a coastal nation and "abstention" by third nations are regarded parallel. Such an abstention idea may be criticized as still determining fisheries rights from a territorial jurisdictional point of view.